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**Banta Catalog Group, a Division of Banta Corporation and Graphic Communications International Union, Local 1–M.** Cases 18–CA–16512 and 18–CA–16710

September 28, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On May 28, 2004, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In addition, the Respondent, subsequent to its brief, called to the Board's attention *Alexandria NE LLC*, 342 NLRB No. 23 (2004), a recent case. However, we find *Alexandria NE LLC*, distinguishable because the lack of evidence of animus was noted there in dismissing the allegation.

Finally, the Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> Although we agree with the judge's conclusion that the Respondent unlawfully issued Blazek a documented verbal warning for leaving work early, we find that he erred in applying the analytical framework established in *Burnup & Sims*, 379 U.S. 21 (1964). In *Burnup & Sims*, the Supreme Court affirmed the Board's rule that an employer violates Sec. 8(a)(1) by discharging or disciplining an employee based on its good-faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. *Id.* at 23–24. The judge essentially found, however, that Blazek was disciplined for acting as a union observer, clearly a union activity, and the Respondent's asserted reasons for the discipline were pretextual. In these circumstances, involving a violation of Sec. 8(a)(3) rather than an independent violation of Sec. 8(a)(1), the proper analytical framework is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and the judge's analysis comports with *Wright Line*. Accordingly, we find that the Respondent violated Sec. 8(a)(3) by issuing Blazek a documented verbal warning for leaving work early.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Banta Catalog Group, a Division of Banta Corporation, Maple Grove, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 28, 2004

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Peter C. Schaumber, Member

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Dennis P. Walsh, Member

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Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Sandra C. Francis* and *James L. Fox*, Attys., for the General Counsel.

*Frances T. Coleman*, Atty., of Washington, D.C.

and *Dennis M. Devaney*, Atty., of Detroit, Michigan, for Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. At issue here is whether the termination of pressman Mike Blazek and the preliminary disciplinary action leading up to his termination violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act). Based on the findings made below, I have concluded that a preponderance of the credible evidence supports the allegations in the General Counsel's complaint.

The Graphic Communications International Union, Local 1–M (the Union or Charging Party) commenced this proceeding by filing the charges against Banta Catalog Group, a Division of Banta Corporation (Respondent or Company) in Cases 18–CA–16512–1 and 18–CA–16710 on July 15 and December 19, 2002,<sup>1</sup> respectively. The Union amended the charge in Case 18–CA–16512 on October 15 and it amended the charge Case 18–CA–16710 on April 25, 2003. On May 7, 2003, the Re-

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In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by suspending and discharging employee Mike Blazek, Members Schaumber and Meisburg note that this finding is not to suggest that in an appropriate case an employer is not within its rights to discipline employees who commit costly production errors. Here, however, the General Counsel has met the initial burden under *Wright Line*, and the Respondent has not demonstrated through comparatives that it has excepted like misconduct from its progressive disciplinary system. The Respondent, therefore, has failed to carry its burden of demonstrating that it would have taken the same action in the absence of Blazek's protected activity.

<sup>1</sup> If not shown otherwise, all dates refer to the 2002 calendar year.

gional Director issued an order consolidating cases, consolidated complaint and notice of hearing. The consolidated complaint alleges Respondent violated Section 8(a)(1) and (3) in connection with various disciplinary actions taken against Blazek, including his suspension and subsequent termination on December 13 and 19, respectively. Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged.

I heard this case at Minneapolis, Minnesota, on June 24–26, and July 23 and 24, 2003. All parties had the opportunity to call and examine witnesses, to present documentary evidence, and to provide argument in support of their position. General Counsel and Respondent filed lengthy posthearing briefs. Based on my careful consideration of the record, the briefs, and the demeanor of the witnesses, I now make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a Wisconsin corporation with an office and place of business at Maple Grove, Minnesota, is engaged in printing and binding catalogs and other materials. During the 12-month period preceding the issuance of the complaint, Respondent sold and shipped goods and materials valued in excess of \$50,000 from its Maple Grove facility directly to locations outside the State of Minnesota. Based on these activities, I find the Board has statutory jurisdiction over Respondent's Maple Grove operation and that it would effectuate the Act for the Board to exercise its jurisdiction to resolve this labor dispute. In addition, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. The Complaint and the Answer

The complaint paragraphs 5(a) and (b) allege that two supervisors, Jim Winters Jr. and Max Hopkins, respectively, threatened an employee by informing him in December 2002 or January 2003 that another employee had been terminated because of his union or other protected concerted activity. Complaint paragraph 6 contains the remainder of the substantive allegation and they all pertain to Blazek.

Complaint paragraph 6(a) charges that Respondent unlawfully prohibited Blazek from entering the pre-press room beginning around June 24. Complaint paragraph 6(b) alleges that that Respondent unlawfully issued a documented verbal warning to Blazek on July 13. Complaint paragraphs 6(c), (d), and (e) are interrelated. Read together, complaint paragraphs 6(c) and 6(d) charge that, under Respondent's progressive disciplinary system, the unlawful July 13 warning enhanced a legitimate warning issued to Blazek on August 28 to the level of a written warning. Complaint paragraph 6(e) alleges that Respondent denied Blazek "a wage increase and other potential benefits" because of the written warning alleged in complaint paragraph 6(c). Complaint paragraphs 6(f) and (g) allege that Respondent suspended Blazek on December 13 and then terminated him on December 19.

Respondent's answer denies complaint paragraphs 5(a) and (b), and 6(a). It also pleads affirmatively that the allegations in

5(a) and (b) should be dismissed because they were never alleged in any charge. Affirmative defenses 12. Although Respondent admits the conduct alleged in paragraphs 6(b)–(g), it denies that it took the action described there for an unlawful motive. Affirmatively, Respondent's answer alleges it was "privileged to take the actions it did under the Act as its actions were taken in good faith for legitimate business reasons unrelated to the existence of any rights guaranteed in the Act." Affirmative defenses 1 and 10.

#### B. Relevant Facts

##### 1. Introduction

Banta Corporation has 11 printing facilities located around the country. The case deals with its facility at Maple Grove, Minnesota, a suburb northwest of Minneapolis. The Maple Grove operation is a part of the division known as Banta Catalog Group. The 313,000 square foot Maple Grove facility is described as the "most technologically advanced web offset catalog printing facility in America." (Jt. Exh. 5: 4–5.) Richard Johnson, Respondent's executive vice president of manufacturing, oversees the Maple Grove operations. Terry Chote became the general manager of production about a month before the hearing and, hence, played no role in the events at issue here. Mike Scherbing, the pressroom manager, played a substantial role in virtually all aspects of this dispute.

Respondent's Maple Grove facility houses five large web presses. Each press is approximately 150 feet long, up to 15 feet wide, and 16 to 18 feet tall. Banta schedules these presses for operation round the clock, 7 days a week. Each press requires a crew of four or five employees, the first and second pressmen, a roll tender, and one or two general helpers or stacker techs, sometimes called joggers. In general, the first pressman has overall responsibility for the quality of the product produced on the press. Altogether, 96 employees work on the 5 press crews. Fewer than 10 employees work in the pre-press department where the press plates are prepared. About 200 employees work in the bindery department, and approximately 40 employees perform the various warehouse functions, including shipping and receiving.

Blazek, the principal subject of this case, worked at the Maple Grove facility for over 13 years. He started as a stacker technician, progressed to a second pressman, and then to the first pressman's position, which he held for 5 years before his termination. Mark Twomey, Blazek's shift supervisor, described him as a "good printer . . . [who] ran numbers," meaning that he was a very productive employee. When Respondent suspended Blazek in December, Jim Winters Jr., who became Blazek's supervisor after Twomey's termination in September, told an employee, "Mike's one of my best producers and he's a hard worker . . . this really bums me out to lose him . . . because . . . it hurts my numbers directly to lose a good pressman."

Banta's employee handbook provides that "[a]ny time an employee is planning a future absence . . . an Employee Time Office Notice must be completed . . . and approved by the employee's supervisor . . . as soon as practical in order to maintain accurate payroll and attendance records." (Jt. Exh. 5: 10.) Even under handbook provisions dealing with inclement

weather absences, the employee must notify her/his supervisor before leaving early. In practice, the procedure works somewhat informally. If an employee needs a short amount of time off on any given day, he/she typically arranges for a replacement worker and tells the supervisor "I got so-and-so coming in for me." Regardless, supervisors must be notified in advance and approve employee requests to leave work early.

The employee handbook also contains a progressive discipline system that provides for a verbal warning followed by a written warning, then a suspension and, ultimately, termination. However, the system is riddled with loopholes, which suggest that strict adherence should not always be expected. Thus, the handbook states: "Banta Catalog Group reserves the right, in its sole discretion, to omit any or all of the [progressive discipline] steps, or add or modify steps, in any particular situation." The handbook then points out, by way of example, that in some circumstances a written warning not preceded by a verbal warning may be warranted and that in other situations immediate termination without prior warning may be appropriate. (Jt. Exh. 5:42.) Nevertheless, the progressive system appears to have been utilized in Blazek's case.

## 2. The organizational efforts

The Union commenced its effort to organize the Maple Grove press employees in January 2002. At that time, a union representative met with Mike Blazek and perhaps others at a nearby restaurant. Over the next few months, the Union held meetings with groups of press employees before it began collecting authorization cards. Blazek attended these early meetings and otherwise assisted the organizing effort by telling his fellow employees about scheduled union meetings, distributing union literature, and soliciting employees to sign authorization cards. On some occasions, Blazek joined union representatives outside the plant gate to help them distinguish the pressroom personnel from other employees as they left the plant.

After management learned of the organizing drive, it began a full-court press. Beginning in approximately April 2002, managers conducted weekly meetings to provide direction for the floor supervisors. Human Resources Manager Lynn Weiss and Company Counsel Coleman attended virtually all of these meetings; Scherbing attended several; and Vice President Johnson, as well as Corporate Vice President for Human Resources Ricardo Orozco, attended a few. During these meetings, the floor supervisors received instructions about keeping employees at their workstations unless they had a specific reason to be elsewhere and to avoid allowing employees to congregate in small clusters. In addition, the managers instructed floor supervisors to watch and report "who was talking to who." Several of these meetings involved discussions between the managers and the floor supervisors seeking to identify employees who favored and opposed unionization. By late April or early May, Blazek had been identified as a prounion sympathizer.

Twomey, Blazek's shift supervisor, first learned of the organizing campaign in April 2002 and attended the management meetings dealing with the organizing drive. As one of the meetings broke up, Twomey found himself leaving the meeting room alongside Johnson. He took the opportunity to ask Johnson "what happens after the union vote" and whether they

could "get back to printing" if the Union lost the election. Johnson responded by saying that it might take a little while to get back to printing and then added "the people that are involved . . . usually leave on their own or leave for discipline issues or peer pressure."

Out in the shop, management's directives to the floor supervisors soon became apparent. On one occasion during the organizing drive, Weiss intercepted Twomey and told him that she had seen Blazek at someone else's press. She queried Twomey about Blazek's reason for being at another press. Twomey could not provide an immediate answer but promised to look into the matter and let her know.

Blazek came under intense pressure from management because of his prounion sympathies. On three different occasions preceding the NLRB election, Vice President Johnson came to Blazek's press to speak with him. On these occasions, Johnson would instruct Blazek to shut the press down and then took him aside to "debate" unionization of the plant while the rest of the crew stood around with little to do. One of these sessions lasted for nearly an hour and the others for approximately 45 minutes. In addition, Scherbing passed out T-shirts with a "vote no" message. On a couple of occasions, he pressured Blazek to take one of these T-shirts and put it on even though by that time Blazek normally wore a union cap around the plant. Similarly, floor supervisors often would yell out "vote no" as they passed by press no. 1 where Blazek usually worked during this period.

The Union filed an RC petition on April 30, 2002. That resulted eventually in a Regional Director directed election conducted on June 25 and 26. According to Shift Supervisor Twomey, Blazek became uncharacteristically cautious about his work in the weeks preceding the election, frequently seeking direction and rarely speaking of anything other than his immediate printing task. As Twomey perceived it, Blazek appeared to be "[v]ery worried about what he was doing and who was watching him." However, Blazek served as the Union's observer at both election sessions. The Union failed to obtain a majority of the votes cast. The Regional Director certified the results on July 5. (Jt. Exhs. 3 and 4.)

When the press department organizing effort became well known, a group of the bindery and warehouse employees also began discussing unionization. Jason White held a couple of meetings at his home and another meeting was held at a bar in Osseo, Minnesota. James Berry, a saddle stitch operator in the bindery who had belonged to a union while working for another industry employer, attended these meetings to provide information about operations in an organized shop.

Following the first meeting at White's house, Berry discussed it with his supervisor. Shortly thereafter Berry and White were called to a meeting in a front office conference room with Bob Byers, the bindery manager, Weiss, and Johnson. Johnson started off by asking the two employees if the bindery employees were talking about organizing a union and why. Over the course of the next 1-1/2 or 2 hours, the three managers sought to obtain information from the two employees about the source of the bindery workers' discontent that would lead them to consider unionization. Subsequently, Johnson visited with Berry for about 45 minutes at his machine to seek suggestions for improving conditions in the bindery. Manage-

ment later held two group meetings with the bindery operators in the training room during which they continued to probe the basis for discontent in the bindery and to seek suggestions for improvements. Johnson, Byers, and Weiss all attended the first of these two general meetings and at least Byers and Weiss attended the second.

### 3. Relevant events

During the course of their work, pressmen, on occasion, go into the pre-press room to pick up printing plates, to have corrections made to a problem plate, or to review proofs. Supervisor Twomey acknowledged that it would not be at all unusual for a pressman to engage in idle chitchat with pre-press employees about weather, sports, or the like during work-related visits to the pre-press room. In fact, he remembered some pressmen with friends in pre-press who would occasionally go to the pre-press room solely to talk with them about nonwork matters.

On June 20, Blazek filled in for another pressman on press no. 2. He occupied the second pressman spot; Dewayne Boeckermen occupied the first pressman position. At some point, they discovered defects in the plates received from pre-press. Boeckermen directed Blazek to go to pre-press to get the problem corrected while he tended to another matter. On his first trip into the pre-press room, Blazek spoke with Anita Schneider, a pre-press employee who had worked on that particular job. Schneider made some corrections on her portion of the work then turned the plate project over to Gary Hoff, the pre-press employee who actually produced the plates. During Blazek's visits to the pre-press room that day, he observed Steve Mallek, the pre-press manager, working on large blue signs that read: "GCIU Go Home."

After his initial consultation with Schneider, Blazek subsequently returned three more times for short periods of time essentially to monitor Hoff's progress in reconstructing the plates. On his last visit to check on Hoff's progress, Mallek immediately confronted Blazek. Mallek questioned Blazek about what he was doing there and then asked whether he (Mallek) could help him with anything. Blazek explained the purpose of his visits and left.

About 15 minutes later, acting pressroom manager Scherbing approached Blazek and Boeckermen at the press console. Scherbing asked to speak with Blazek and then told him: "Look, you can't be going into pre-press any more . . . A manager . . . observed you in there and we think you are talking to people about the union so you can't go into pre-press any more." Blazek asked Scherbing how he expected him to do his job without going into pre-press but Scherbing brushed off Blazek's observation by saying: "Well, we can't have you going in there any more." Boeckermen, who purportedly overheard Scherbing's remarks, told Blazek that he would take care of the plates and the matter went no further that day.

Before his involvement with the Union, Blazek had never been barred from any area of the facility where his work required him to go. Between June 20 and July 19, Blazek never entered the pre-press room. In fact, on one occasion when he encountered a problem with a plate, Blazek observed Scherbing speaking with Tom Krysiak near the pressroom office. Blazek

took the plate to Scherbing and pointed out the problem. When Scherbing told Blazek to go have the plate repaired, Blazek reminded him that he was not "allowed in pre-press anymore." Scherbing replied, "Oh, that's right. I'll take care of it." Scherbing then took the plate from Blazek and went into the pre-press room himself.

Employees who need to leave work early or who anticipate being late for the start of a shift ordinarily notify their shift supervisor for approval and then arrange for a substitute to take their place. In situations involving pressmen, the substitute must also be a pressman but a first pressman can arrange to have a second pressman perform the substitute service.

The NLRB conducted a representation election among the pressroom employees on June 26 and 27. Over the weekend preceding the election, a union representative asked Blazek to serve as the Union's observer at both election sessions. The union agent instructed Blazek to obtain permission from his foreman to leave his workstation early in order to perform the observer duties.

When Blazek went to work on Monday, June 24, he stopped by the pressroom office before his shift started and learned that Tim Nolen would be the acting shift supervisor that day due to the absence of the regular shift supervisor, Mark Twomey. Blazek told Nolen: "Look, I was asked to be the union observer on Wednesday and Thursday. I need to get off at 5:30 and I have Mark Waltz working for me." Nolen simply responded, "Okay."<sup>2</sup> Subsequently, Blazek arranged for Mark Waltz, a second pressman, to report for work early and serve as his replacement for roughly an hour and a half, the time that would be required at the polling area before the end of his shift. Twomey claims that Waltz was a capable pressman.

By the first day of the election on Wednesday, June 26, Supervisor Twomey had returned to work. At about 11:30 a.m., Blazek told Twomey that Mark Waltz would be in at around 5:30 p.m. to substitute for him because he had to leave to be the union observer. Twomey nodded and said "Okay." Around 5:15 p.m., Waltz arrived at the plant and came to press no. 1. Blazek briefed Waltz on what was going on and Waltz left to change into his uniform. Blazek then told Mike Walters, his second pressman, that if he needed him he would be in the room where the election was being held. Blazek then punched out and changed out of his uniform.

When Blazek arrived at the polling area, he was introduced to numerous officials of Respondent, including Richard Johnson, as the Union's observer. No evidence shows that Blazek's absence for the election June 26 created the kind of a problem that either necessitated summoning him away from his election duties or requiring him to report for duty after the election session. When Blazek came to work on June 27, the second day of the NLRB election, he immediately told Shift Supervisor Max

<sup>2</sup> I base the findings in this paragraph on Blazek's uncontradicted account, which I credit. Nolen did not testify nor was his absence explained. At the hearing, counsel for the General Counsel argued that Nolen, then classified as a nonsupervisor trainer, served as Respondent's agent at this particular occasion because he filled in for the absent Supervisor Twomey. I agree. In fact, Respondent regularly utilized Nolen to substitute for absent shift supervisors.

Hopkins that he would be leaving early to be an election observer. Hopkins too told Blazek that would be okay.

No manager or supervisor spoke to Blazek about his early departures to serve as the election observer until July 2. At about 1:30 p.m. that day Scherbing stopped briefly at Blazek's press and told Blazek he wanted to get "all this union stuff behind us" and "just get on with printing" now that the election was over. Blazek agreed and Scherbing left.

About 3 hours later, Scherbing came back to Blazek's press. This time he told Blazek that he was "really disappointed" that Blazek had not told him that he would be leaving to be the union observer. Blazek responded that he had told the shift supervisor about it. Scherbing told Blazek that Richard Eliason, a folder machine repair specialist employed by one of Respondent's vendors who was present at the plant to make adjustments on press no. 1's folder device, became very irritated because Blazek left early and second pressman Mike Walters just stood around doing nothing.

Scherbing explained at some length that Blazek's absence had a profound impact on getting operations up and running on press no. 1 late that day. He explained that Respondent had flown Eliason from Boston to Minneapolis that day to deal with the problem folder and that neither Walters nor Waltz had sufficient experience to competently assist Eliason as Blazek would have been able to do. Scherbing persistently denied that Eliason became upset because no oil could be located for the folder's pumps as Blazek claimed. Scherbing insisted that Blazek's early departure hampered Eliason's work and prevented him from getting press no. 1 running until Jim Walters, the night shift first pressman who allegedly had considerable experience as a trainer on that type of press, arrived to assist. As it turned out, Respondent's records demonstrated that Walters did not work that night.

On July 13, Twomey called Blazek off his press and took him to the office of Human Resources Manager Lynn Weiss. Scherbing was present when they arrived. At that time, Scherbing issued Blazek a documented verbal warning for leaving his press early on June 26. The warning states in pertinent part:

Following our discussion last week about your leaving your workstation early on Wednesday, June 26, 2002, I met with the supervisory team in the pressroom. I learned that none of them had given you permission to leave early.

Mike, it is important that you understand that this type of action was inappropriate. All changes to your work schedule require your supervisor or the department manager's approval. It is our expectation that in the future you will seek the appropriate approvals prior to your departure, and that if you do not have approval that you will continue to work according to your schedule.

Blazek protested claiming that he informed both Nolen and Twomey that he planned to leave early on the days of the election to act as the observer and that he had arranged for a replacement. Weiss and Scherbing shrugged that off. Twomey said nothing during the disciplinary meeting but at the hearing he denied that Blazek had informed him that he would be leaving early on June 26.

Blazek questioned why he was only receiving a warning for leaving early on Wednesday when he did the same thing on

Thursday. Scherbing explained that Supervisor Hopkins acknowledged that Blazek had provided advance notice to him of his early departure on Thursday. Later in the meeting, Scherbing shook the writeup at Blazek and stated with "kind of a smile" that he would "be happy to tear this up if you can remember who it was you spoke to." Blazek responded by stating: "Look, I've told you guys about three times now I told Tim Nolen right away on Monday morning and I also told Mark Twomey around 11:30 on Wednesday."<sup>3</sup> Blazek refused to signed the writeup because he felt that it was "completely wrong." After being assured there was nothing further, Blazek returned to work.

Although Blazek's shift supervisor, Twomey, earlier told Scherbing and Weiss that he had not approved Blazek's early departure on June 26, he also told them that in his opinion a warning so soon after the election would be inappropriate and that he did not think it was right. Twomey told the two managers that he thought they were picking on Blazek.<sup>4</sup>

On July 15, the Union filed Case 18-CA-16512-1 charging that Respondent "made a unilateral change in Mike Blazek's working conditions by not allowing him to go into the pre-press department in retaliation for Blazek's involvement in the organizing drive at the plant." It further alleged that Respondent "wrote up Mike Blazek in retaliation of Blazek's involvement as the union observer at a representation election conducted on June 26-27, 2002."

Scherbing met with Blazek on July 19 and withdrew the restriction against entering the pre-press room in the course of a meeting arranged ostensibly after Weiss told Scherbing she had received a complaint about Blazek leaving materials outside the pre-press room. Scherbing instructed Twomey to bring Blazek to his office in order to clarify the claim that Blazek had been barred from the pre-press department. Blazek requested to have Randy Hart, another pressman, present and that too was arranged. In addition, Blazek surreptitiously tape-recorded the meeting. The recording and the transcript reflect lengthy quibbling about the documented verbal warning Blazek received on July 13 relating to his early departure from his workstation on June 26 to act as the election observer. This exchange occurred concerning the source of Eliason's anger discussed earlier:

Scherbing: This is what I have to say, though, OK? Where I'm coming from is I was up since midnight or 2 a.m. that night with that folder. I was in here about 3:30. I had Richard Eliason on the phone at 4 a.m. at his home. OK? He flew in here on an emergency to get that and he worked with

<sup>3</sup> Twomey did not work on Monday, June 24. Twomey claimed that Scherbing called him around 5:30 or 5:45 p.m. on June 26 inquiring into Blazek's whereabouts. Until then, Twomey claimed that he knew nothing about Blazek's intention to leave early that day. Twomey denied that Blazek told him about having arranged for a replacement at the end of his shift on June 26.

<sup>4</sup> In September, Respondent terminated Twomey because he had a "bad attitude." No evidence links Twomey's termination to his minimal support for Blazek on this occasion.

Brian all day.

Blazek: Right.

Scherbing: I've come around over here, come out of the truck, or something, it was quarter to six and I come through there, he was leaning up against some baskets, really upset.

Blazek: And he was mad. And do you know why he was mad?

Scherbing: Because he was—I said, "What's up?" "I don't know." I said, "What do you mean you don't know? What's going on?" "Waiting for some God damn oil."

Blazek: He was mad because there was not one drop of DTE light oil in the building.

Scherbing: I see.

Blazek: That when Mark — that's where Mark Waltz was. That's where he was the whole time. That's why Mark. . . he was looking all over the building. There was not a drop. Richard was getting pissed off because Mark came back three times with different oils and none of them were right and they wouldn't work, and the closest thing he could find was a 630 gear lube for our units and it wouldn't work in there. The [inaudible] had been dumped out and cleaned. Well, nobody was aware of that. That's what Richard was ticked off about.

As for the issue over Blazek's access to the pre-press area, all agree that Scherbing removed any prior restriction. Later that day, Scherbing sent Blazek a memorandum stating that his job required him to go to pre-press from time to time and that when "your job requires you to go into pre-press, we expect you to do so." Joint Exhibit 7.

On August 8, Blazek and Paul Engelstad had an altercation of some sort. Eventually both received a performance warning about the incident between them. Because no allegation pertains to the incident itself, no one adduced evidence as to what precisely occurred that led to the subsequent disciplinary action described below.

Until Blazek's last couple of years at Banta, the management conducted employee reviews in a somewhat erratic fashion. Most generally, management would establish a fixed percentage for annual across-the-board wage increases and would implement those increases in September or October without con-

ducting reviews for most employees. Until 2002, Blazek received the across-the-board increase every year.

Around August 20, Respondent adopted new "Plant Wage Structure Procedures" effective September 2. (R. Exh. 15.) The portion relevant here (the 6-month rule) states: "An employee who has received a written warning in the past six months, will not be eligible for the salary increase at this time." The employee will be eligible for the raise at their next review date, but will be dependent on performance improvement." General Counsel makes no claim that Respondent adopted this 6-month rule for discriminatory purposes.

On August 28, Human Resources Manager Weiss and Scherbing summoned Blazek to a meeting in the Scherbing's office. At that time, Weiss informed Blazek that the meeting amounted to his wage review and that he would not receive a pay increase under the new 6-month rule because he received a prior warning (referring to the unlawful July 13 warning) and would soon be receiving a written warning for the incident with Engelstad on August 8. Blazek protested that they, in effect, were conducting a disciplinary meeting and told the two managers that he would not "sit in here and talk to you without a witness." Blazek then got up to leave. As he walked out, he claims that he overheard Weiss sternly tell Scherbing, "You have to support me on this." Both Weiss and Scherbing deny that claim by Blazek. Weiss claims that she followed Blazek out the door and urged him to return three times without success.

On September 3, Weiss arranged to have Blazek brought to her office where she issued the written warning, dated August 29, for the Engelstad incident that occurred on August 8. In addition to Blazek and herself, Scherbing and Twomey were present. The warning states in pertinent part:

Both you and Paul conducted yourselves in an inappropriate manner by engaging in a shouting match, disrupting other employees and creating a bad impression on a customer who was in the area. In addition, you were involved in a collision with the forklift that Paul Engelstad was operating. This incident not only involved unsafe driving, but could have caused damage to our product and equipment and could have also resulted in serious injury to you and to others.

After the meeting ended, Scherbing told Twomey as the two walked back to their respective areas together that if "we'd have had a safety director with balls we'd have had him by now."

Respondent's Exhibit 17 shows that Engelstad received a verbal warning on August 29, presumably for the same incident. The General Counsel does not contest the basis for this written warning to Blazek. Instead, General Counsel only claims that under the progressive disciplinary system Blazek would not have received a written warning in the absence of the prior verbal warning he received on July 13, found unlawful above.

In October, a Teamsters' representative prevailed upon Blazek to attend a meeting on October 17 at a local restaurant for the purpose of describing the Company's campaign during the period when the press department employees attempted to

organize. When Blazek arrived for the meeting he immediately noticed Jim Winters Jr., his supervisor, seated nearby. Blazek identified Winters to the union representative and one of the representatives confronted Winters about the purpose of his presence. Winters claims that he arranged to meet a friend at the same restaurant at approximately the same time so his presence was a happenstance. Regardless, Winters later admitted to Randy Hart that he had informed Richard Johnson about this restaurant meeting.

On October 28, Supervisor Winters instructed Blazek that henceforth the pressmen would be required to put lids on product placed in telescopic boxes. Blazek argued with Winters' directive. He claimed that he already had enough to do and that his new directive contradicted the decision made a couple of years before that the shipping employees would perform this task. Subsequently, Scherbing approached Blazek's press and instructed him to follow the directive given by Winters. Although Scherbing claims that he agreed to do so, he found that Blazek still had not started putting the lids on the boxes when he returned an hour later. On this second visit, Scherbing told Blazek that he had 15 minutes to start following the instruction to put the lids on the telescopic boxes and to attach the load tags on the lids. By the time Scherbing returned a third time, he found that Blazek had finally begun to install the lids but was incorrectly attaching the load tags.

In addition, the original complaint in Case 18-CA-16512 issued on October 28. It alleged Respondent violated the Act by barring Blazek from the pre-press room before the NLRB election, by disciplining him for leaving early on June 26 to serve as the observe, and by issuing him a written warning on August 29 and denying him a pay increase.

On October 30, Scherbing issued a "Final Written Warning" to Blazek reciting the difficulty encountered obtaining Blazek's compliance with the instruction about the box lids on the previous Monday. The warning concluded with the following:

Your not following the work direction that was given to you by your supervisor and a second and third time by me is insubordinate and will not be tolerated. Your conduct and defiant, insubordinate, and belligerent attitude cannot be allowed to continue. You must change your attitude and your antagonistic and defiant behavior immediately.

Please be advised that if this issue, or continued failure to follow management direction, and/or violations of policies and procedures, will result in immediate disciplinary action up to and including termination.

Blazek sent a formal written complaint dated November 1 to Weiss with a copy to Ricardo Orozco, the Company's human resources vice president. In it, he complained about being discriminated against and harassed because he supported the Union during its organizing effort. Without providing specifics apart from labeling him as not being a "team player," Blazek charged that the "actions this Company has taken over the past few months have caused me to lose sleep and much emotional distress." Orozco responded in a letter dated November 7. Orozco denied that the Company had discriminated against Blazek because of his union activities and asserted that the progressive discipline he had recently received was "fully justified and in line with standard practice." Orozco expressed

sympathy for the personal problems Blazek described in this letter and suggested that he seek assistance under the company-sponsored employee assistance program. Although Orozco noted the respect the Company managers had acquired for Blazek over the years, he stated that in recent months his conduct had "been one of a defiant attitude that appears designed to push your managers to the limit and force them to take disciplinary measures." Orozco invited Blazek to furnish more specific information but he never did.

Blazek worked overtime on November 7 substituting for the vacationing first pressman on press no. 2. When he reported for work, Ryan Carter, the second pressman, and he agreed that Carter would take the first pressman's position and Blazek would serve as his second pressman.<sup>5</sup> At the time, press no. 2 had been set up to print the Minnesota tax form job in house at the time. The press crew on the shift about to leave reported to Carter that they had encountered considerable wrinkling that required them to repeatedly hand wash the press blankets to correct.<sup>6</sup> To make matters worse, the previous crew overfilled the ink reservoir just before the shift ended.

As a result, Carter's crew spent their first hour or two cleaning up the ink spill before they began running the press again. Meanwhile, Carter went to his supervisor, Max Hopkins, to complain about the press setup as he concluded that the time wasting hand washing of the blankets resulted from an improper setup. Hopkins insisted that they get the press running as soon as possible and that he would come out to assist them. On his way from Hopkins' office to the press, Carter briefly encountered Scherbing and complained to him about the press setup. Scherbing, who was about to leave for his vacation, told Carter that he should speak to Hopkins who would be serving as the acting pressroom manager.<sup>7</sup>

When press no. 2 finally began operating that morning, the crew encountered an ink buildup problem that caused print with a three-dimensional look, an effect known in the trade as "doubling." Carter shut the press down and went back to Hopkins. This time Hopkins came out to the press and assisted the crew off and on for nearly 4 hours in their various attempts to solve the wrinkling and doubling problems that they encountered repeatedly. Carter provided the following credible and significant description of those difficulties:

Q. Okay. After you talked to Mike Scherbing, what did you do at that point?

A. I went back to the press to find out where my guys were at, as far as the cleanup, and we started up again and I found some doubling problems when we started up.

Q. Okay, I'm just going to stop you for a minute. Would you explain, what's a doubling problem?

<sup>5</sup> This type of position switching is not unusual particularly where, as here, the situation involves an experienced second pressman.

<sup>6</sup> In addition to creasing the paper, wrinkling can also cause blurred print.

<sup>7</sup> John Schumacher substituted for Hopkins as the shift supervisor. Schumacher did not testify and no one suggested that he ever became involved in the press no. 2 difficulties on November 7.

A. A doubling problem is a carry-through where the ink builds up on units that are not moving and occasionally will show up on the product.

Q. And how do you recognize it on the product? What does it look like?

A. It looks like a 3-D effect.

Q. Okay, so you went to your press and talked to your crew about that?

A. No, I went back to my press to get it started.

Q. Okay, I'm sorry.

A. But when I started up the press I notice that problem right away.

Q. Okay?

A. And so I went back into the office and talked to Max about it.

Q. And did you talk to Max?

A. Yes, I did.

Q. And what did you say?

A. I told him that for some reason the ink was transferring from the other units and I had him come out to the press to look at it.

Q. And did he say anything?

A. No, he just came out to the press and then we ended up shutting off some units that were on that didn't really need to be the way it was set up.

Q. Okay, would you tell me what the units—when you're talking about units—

A. A unit is where the paper runs through and it transfers ink to the paper to give it an image. And there's 16 units, they're double-stacked so that there's actually eight units that you can print on both sides of the paper.

Q. Is a unit the same thing as a blanket?

A. It is part of the unit.

Q. A blanket's part of the unit?

A. Correct. There's two blankets for every unit.

Q. Okay. So Max came over?

A. Uh huh.

Q. And what happened then?

A. We ended up shutting off the impressions on unit 7a and 3 and 4 because they were causing wrinkles and a doubling 3-D effect. And it was coming and going depending upon the run length. The longer you run it would show up and then it would disappear and then it would show up and then it would disappear.

Q. Okay, and was Max there at this time?

A. Yeah, Max pretty much stayed over there. I mean coming and going. He had other things going on but he was back and forth helping us out probably until 11:30 or so.

Q. Okay, so were you actually printing product?

A. We were. And we were up and down because we had other problems going on. We had a nip that wasn't coating the web. We had to cut off because of the air pressure or something was messed up on it. And I had other problems in the units where a wrinkle was coming. Later we found out it was coming from where the ink overflowed. It caused a wrinkle on a pipe roller. But I had Mike working on the folder—

Q. Mike Blazek?

A. Mike Blazek working on the folder at the time so I could concentrate on the printing unit.

Q. Okay. So what time are we talking about now? Mike is over on the folder, you're concentrating on the—

A. Well, from the beginning of the shift Mike was pretty much in charge of the folder. I was having him work on it. He was correcting things and Max and I were working in the units trying to eliminate wrinkles and the doubling effect.

Q. Okay.

A. Trying to gain control of the press again.

Q. And did you and Max have any further conversations about it?

A. Other than the fact that he told me that I needed to get rid of the wrinkle and that's what we were working on.

Q. Did he tell you how to get rid of it?

A. He made a suggestion that I shut down and change a blanket or tighten a blanket?

Q. And did you do that?

A. Yes, I did.

Q. And did that work?

A. No, it didn't.

Q. Okay. Did he say anything else?

A. He came back over and we tried tracking the wrinkle further and further back and we found that it was coming from underneath the unit that had overflowed. The ink had overflowed onto a pipe roller and it cause a build up which was creating the wrinkle.

Q. And so Max was with you when you found that out?

A. Yup.

Q. And did he say anything to you about it?

A. Yeah, he asked me to shut down and clean up all the pipe rollers with a scouring pad.

Q. Did you do that?

A. Yes, I did.

Q. Did that fix it?

A. Yup.

Q. So did you have—first of all, during this time was there any product produced?

A. Between—I mean there was product being produced between, I'd say 7:30 and 10:30, but it was up and down, up and down because we were working on things. So it wasn't a continuous run.

Q. And was this product kept?

A. Some of it was and some of it wasn't.

Q. *How did you know what to keep and what not to keep?*

A. *Some of was obvious that you wouldn't keep it and some of it was not. I mean some of it was questionable and that's why I had asked the supervisor about it.* [Emphasis mine.]

Q. And you asked Max about some product?

A. Some of it, yes.

Q. Okay, what did you say?



A. I said—well first I told him I couldn't believe the way it was set up and that this stuff could have been avoided had the press been set up correctly.

Q. Okay.

A. But he told me that we had to get rid of the wrinkle and that's what we did. That's what we were working on.

Q. Did he say anything about the product at all?

A. I don't recall.

Q. So after you scoured the blanket—

A. The pipe rollers.

Q. The pipe rollers, I'm sorry, did that take care of the problem?

A. It took care of the wrinkle.

Q. Okay, and will you explain to me, when you talk about a wrinkle, what it is you're talking about?

A. Well, the paper is controlled by tension and if it goes over a surface that is not smooth it will create a wrinkle and so it will cause imperfections in the printing?

Q. And how do you know a wrinkle when you see it on product?

....

THE WITNESS: It's a crease in the paper. Sort of like this. I don't know how to explain that.

....

Q. BY MS. FRANCIS: Is there printing underneath the crease?

A. There will be printing on both sides. It depends upon where the wrinkle is created. If it's created after the printed product you'll be able to read it. If it's created before the printed product you will not.

Q. Okay. What was the wrinkle you were seeing?

A. We had a few of them.

Q. Oh, different kinds?

A. Right. We had them coming from the nips in the folder area and that's what Mike was working on.

Q. Okay.

A. I had some coming from the printed units, which was not showing type. That was coming before the printed unit. That's what Max and I were working on.

Q. Okay. And then that -

A. The doubling effect was found while we were looking at the wrinkle.

Q. Okay.

A. Because we were going back and forth checking. Going back and forth and then we happened to open up a copy and see a 3-D effect and he's like, "Well, it's piled up on these units." And to eliminate it we shut them off and cleaned them up.

Q. And that's how you got rid of that 3-D doubling effect.

A. Right.

Q. So that was done for the day then?

A. Right.

Q. Okay. So then you scoured that.

A. The pipe rollers.

Q. Okay, you scoured that and that—you and Max fixed that. What about, you said that Mike had a different wrinkle. He was working on the folder?

A. Right. When the nips cause pressure to pull the paper through the press and if the pressure is uneven or unbalance in some way it can cause the wrinkle. Or it can cause the wrinkles which are guided by air around these rollers. And if the air's not set up right, or if it's out of—it's not set up straight or whatever, it can cause the wrinkle also. And when it's printing it can change with the speed so it's something you have to continually watch for.

Q. Okay. Did that problem get fixed?

A. Yes, I believe it was.

Q. Okay.

A. I seem to remember the first four hours of the day were a lot of these little problems and then after that we seemed to run good. We seemed to basically get rid of all the problems.

Hopkins' account does not differ substantially from Carter's. Although he denied that he ever instructed Carter to keep defective product, he did not address Carter's reference to more borderline product. According to Hopkins, the "first pressman—head pressman is—is responsible for the product coming out the press and the person taking the time stamp is also held responsible for inspecting the product coming off the press." Once press no. 2 became fully operational, Blazek took the time stamps.<sup>8</sup> In the time stamp taken at the 525,000 impression interval, Blazek noted, "paper wrinkling off and on." Carter admits that he saw some wrinkling but he did not deem it bad enough to warrant throwing the product away because the material was still readable.

At the November 20 production meeting, Scherbing learned from Debra Youngblood, the account manager for the Minnesota tax form project, that the Minnesota State officials had print quality problems with the tax forms. She said the State officials reported wrinkling and blurring on some of the product shipped to the State that made some of the tax tables impossible to read. Scherbing asked to have the defective product returned to the plant. As a result, the State of Minnesota sent back a total of 75 skids of tax form booklets, 225,000 booklets, or roughly a third of the total project.

Once the product returned, Scherbing put together a crew of light duty and temporary employees to go through the returned materials in search for defects. The crew located and discarded 47,000 defective booklets after salvaging the enclosed envelopes. On December 12, the Company reprinted replacements for this discarded product. Scherbing put the cost of locating and replacing this defective product at \$50,000 to 60,000. Lynn Weiss identified a precise calculation prepared by Respondent's accounting department that put the cost at \$65,732.93 without transportation expenses estimated to be approximately \$2000. See Respondent's Exhibit 18. During 2002, Respondent incurred other spoilage expenses in ranges

<sup>8</sup> On this project, the crews pulled time stamps randomly ranging in intervals from 10,000 to 25,000 signatures. Scherbing found evidence of wrinkling and blurring on the time stamps Blazek pulled at the 475,000, 500,000, and 525,000 signature intervals.

below and above that amount. They were as follows: Smile-makers job in March—\$40, 900; Disney job in July—\$111,780; Dream Products job in October—\$39,213; and Swanson Health jobs in November and December—\$46,086 and 50,000, respectively. Weiss professed an inability to remember if any of the employees involved in these errors had been terminated or disciplined.

Meanwhile, Scherbing began perusing the production records for the project in an effort to locate precisely when and who produced the defective work. Although he admitted that once the product leaves the plant it would be impossible to tell, just from the item itself, which crew produced the defective work, he set out to identify when the defective work occurred. As a result of reviewing the crew sheets, time stamps, the load flags, the bindery pulls, skid tally sheets, and after speaking with all of the crews, Scherbing concluded that the defective work had been produced by Carter's crew somewhere from the start of their shift up to about noon. Thus, Scherbing testified as follows:

So after talking with him [Carter] and the other crews to me it appeared that it was isolated to that time frame from the start of that shift up until the first part of the one that they had got into according to the time cards up and around about 11 a.m., maybe even into noon.

According to Scherbing, the other crews denied that they had a wrinkling problem to their crew reports both reflect considerable amount of hand washing of blanket, the same remedy Hopkins suggested to Carter in order to cure his wrinkling problem. Scherbing also claims that Carter "was under the impression that none of the defective product got into the bindery."

Carter, on the other hand, claims that he had two meetings with Scherbing and Weiss over the Minnesota tax form job. When Scherbing showed him the Blazek's time stamps containing the wrinkles, Carter told them, in effect, that he would not have thrown the product away based on those time stamps because it was still readable and that he had seen a lot worse work leave the plant. In addition, Carter told them that Hopkins had been there at the time, that he had been shown product, and that Hopkins never directed him to throw anything away. According to both Carter and Blazek, during the Scherbing-Weiss investigation, no one ever showed him any of the tax forms actually returned by the State of Minnesota.<sup>9</sup> However, Winters took Randy Hart to some pallets containing the Minnesota tax forms and showed some to him containing slurred and distorted images. Winters reacted by saying "Oh, wow." Hart said their exchange then continued as follows:

"Mike ran this" Mike Blazek. And I go, "Really?" He goes, "Yeah, Mike ran this,"—and then he said, "You know, everybody thinks the company is after Mike"—he goes, "But how can we defend something like this?" And I said, "Well, I—I don't know anything about it." I says, "This is the first I've

seen or heard of it." And he goes, "Well, I don't know"—he says, "what they're going to do about it." He goes, "But this stuff is going to have to be reran. The customer—you know, isn't happy with it," and so forth. And at that time, he said—he goes, "Well, don't you think somebody kind of pressed a little bit. Don't you think this is something that somebody should be written up for," and I says, "Well," I said, "If a pressman ran this and he knew it and he didn't tell anybody and he put it on a pallet, I can see an employee being written up for something like this."

In the second meeting with Scherbing and Weiss, Carter was told that he would probably receive either a verbal or a written warning over the work performed on November 7. Carter claims that in this meeting Scherbing and Weiss began discussing assessing greater responsibility to Blazek because he was a first pressman and should have provided him with more support. Carter again told the two managers that he had made the decision to keep the allegedly defective product.

Regardless, Scherbing felt that both Carter and Blazek shared the responsibility "to ensure the quality of product being produced on that press." By Scherbing's reasoning, since Blazek took the time stamps he obviously would have been in the area where the final product came off the press and, hence, he had a greater "responsibility to catch this defective product" and discard it away before it got to the bindery. Even though Scherbing concluded that the defective work had been produced and passed along to the bindery during the period of greatest oversight by Acting Pressroom Manager Hopkins, Scherbing made no mention of consulting with Hopkins during his investigation and in his testimony, Hopkins merely alluded to speaking with Scherbing during his investigation in response to a leading question. When Scherbing and Weiss questioned Blazek extensively about the Minnesota tax form job in a "coaching" session on December 6, he told them that Hopkins had been had been at the press no. 2 "between twelve and fifteen times" on the morning of November 7.

In the period from late November until February, Respondent also printed tax booklets for the Federal Government. Unlike the State of Minnesota, the U.S. Government Printing Office (GPO) assigned inspectors to plant operations to monitor quality. At a production meeting on December 2, Scherbing learned that the government inspectors had quality issues with the Federal tax booklets recently produced. In particular, the inspectors claimed the perforations that permit a form to be easily torn from the booklet were not centered in the backbone of the booklet as the specifications required.<sup>10</sup>

Scherbing and two unidentified supervisors set out to investigate this problem. Four skids of perforated pages had been set aside in the bindery because of the out-of-place perforation found by the GPO inspectors. Because the problem had been identified early in the bindery process, these pages had not yet been incorporated into a completed booklet. Scherbing and the supervisors had the skids returned to the press area and began going through them to locate perforations problems. They found about 10,000 forms with the perforations anywhere from

<sup>9</sup> Carter saw some of the forms after Blazek's termination. By the time of the hearing, however, the forms returned by the State of Minnesota had been discarded much to the consternation of the General Counsel.

<sup>10</sup> The specification permitted a deviation up to sixteenth of an inch outside the backbone.

a quarter to half an inch off the backbone. Scherbing claims that the load flags demonstrated that the defective products came from Blazek's press on November 29.<sup>11</sup> Blazek flatly denies that claim.

On December 5 when Blazek next returned to work, Scherbing spoke to him at approximately 8 a.m. and showed him some of the defective perforations. Scherbing claims that he stressed the importance of keeping the perforations on the backbone or within limits and told Blazek that the GPO was not happy with the work so far. Around noon, Scherbing returned to press no. 1 where Blazek worked and again stressed the need to keep control of the perforations. Shortly thereafter, Scherbing participated in a conference call with a GPO official in Washington, a company account manager in Chicago, the three GPO inspectors at the Maple Grove plant, Tom Krysiak (a longtime Banta manager then serving as a pressroom consultant), and Vice President Johnson. The GPO officials supposedly stressed their displeasure with the misaligned perforations produced at Maple Grove and other defective work performed elsewhere. Scherbing claims that following the meeting, Johnson stressed to him that he needed to get the perforation problem under control.

Following the meeting, Scherbing and Krysiak returned to press no. 1. Around that particular time, Blazek claims that he noticed the perforation starting to wonder off the backbone so he slowed the press to the makeready speed, instructed the second pressman to begin throwing away product upon his instruction, and climbed up on the ribbon deck to make a particular adjustment. When he returned, Scherbing and Krysiak were at the folder area throwing away product. Scherbing, according to Blazek, asked why he was keeping the product with the perforations out of position. Blazek claims that he told the two managers that he did not intend to keep the product because it had been produced while he was making adjustments and the helpers were supposed to be throwing it away.

For his part, Scherbing claims that when he arrived with Krysiak, Blazek was standing by the folder watching the product coming off the press. According to Scherbing, they pulled samples from the skid containing material to be saved and it was obviously defective. He immediately questioned Blazek as to why he was saving the product. Purportedly, Blazek responded that he was not saving it and that one of the helpers simply failed to throw it away. Scherbing testified:

When we—Tom and I came out of the front office and where the door comes out of the front office into the production area is actually on the back side of press 1. As we came around and started walking towards the folder it's about 125 feet approximately to the folder and the folder is in clear sight. The whole time that I'm walking up—Tom and I are walking up I believe I seen Ken Larson starting to pull almost full skids from the—off of the press and Mike Blazek was standing

there by the folder monitoring what was being—what was coming off the press at the time.

Krysiak, however, disputed Scherbing's claim that Blazek was at the folder monitoring the product when they arrived at press no. 1. He first observed Blazek coming from the other end of the press. He also identified the principal defect at Blazek's press and in the telephone conference earlier that day as being an insufficient perforation penetration so that the form could not be properly torn from the booklet.

On December 13, Scherbing took Blazek to the conference room in the human resources department where Weiss awaited them. Blazek requested to have Randy Hart present as a witness. At that time, Weiss informed Blazek that he was being suspended until the Company completed its investigation concerning his work performance. He received no written notification of this action but everyone agrees there was a wide-ranging discussion about the Minnesota tax form job and the GPO job.

When Hart returned to his workstation following Blazek's December 13 suspension, he expressed concern to Winters, his supervisor, that he would be next. Winters told Hart that there was "a big difference between you and Mike." Winters described that difference as follows: "When Ken Bret and Dave were fired and everybody else—everybody backed off . . . but . . . Mike wouldn't drop the issue with the union and wouldn't back off and you did—and everybody else did." He added that Hart should "just do your job and everything will be fine."

The day after Blazek's suspension, Ryan Carter told his supervisor, Max Hopkins, that he felt bad about Blazek's suspension since he rather than Blazek had been running the press when the errors on the Minnesota tax form job occurred. Hopkins responded by stating: "Mike did it to himself. He just didn't know when to quit and you were kind of in the way. On December 18, Scherbing gave Carter a written warning for failing to ensure that the defective product produced on November 7 "did not get to our customer." His letter alleges that 50,000 copies of defective product had been "found during the time stamps of 475,000, 500,000, and 525,000.

Neither Winters nor Hopkins flatly contradicted the foregoing statements attributed to them. Winters, however, claimed that his remarks to Hart on this particular occasion really referred to the fact that Blazek had clammed up after the election because he feared getting in trouble if he said anything. As a consequence, Winters claimed, Blazek could not even effectively give directions to, or rely on, his crew members and wanted to do everything himself to avoid getting written up. Hopkins attempted to explain away his "didn't know when to quit" remark by claiming that he intended to refer to Blazek's anger toward the Company following the election and his inability to let go of it. Hopkins never addressed the "you were kind of in the way" remark that Carter attributed to him.

The following week Weiss contacted Blazek and requested that he return to the plant. When he came to the plant on December 19, she notified him of his termination. Referring to the Minnesota tax form job of November 7, the GPO job of November 29 and December 5, the termination letter asserted that he "failed to fulfill the responsibilities" of an experienced pressman and that his disregard of his basic duties "resulted in

<sup>11</sup> R. Exhs. 8(a)-(d) contains three load tags which appear to bear Blazek's initials and a sample of a tax form with the defective perforations. The General Counsel's brief argues that only Scherbing's testimony links these three load flags to the defective form and that I should not credit that testimony for a variety of reasons. As noted, Blazek flatly denies that he produced the defective form at press no. 1.

defective product being shipped to the bindery for further processing.” Blazek’s purported “inattention” to his duties, the letter asserts contributed to the \$50,000-\$60,000 loss the Company incurred and the resultant embarrassment. The letter advises since the derelictions on the three dates involved followed closely after a final written warning, the Company had “no other alternative but to terminate your services effective immediately.”

### C. Further Findings and Conclusions

#### 1. The 8(a)(1) allegations

Section 8(a)(1) provides that it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 grants employees the right “to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.”

The Board held that managers or supervisors violate Section 8(a)(1) by telling or implying to employees that another employee had been terminated for their union or concerted activity because such statements tend to coerce the hearers in the exercise of Section 7 rights. *Aero Metal Forms*, 310 NLRB 397, 400 (1993). The General Counsel contends that Winters’ remark to Hart and Hopkins’ remark to Carter following Blazek’s suspension effectively communicated to those two employees that he had been terminated for his union activity. Respondent argues that the circumstances demonstrate that these statements lack any coercive character. Respondent contends that Winters’ and Hopkins’ statements, made after Blazek’s suspension, do not constitute threats directed at Hart and Carter, respectively, when considered in context and viewed in light of the speakers’ explanations.<sup>12</sup> In addition, Respondent argues that General Counsel failed to produce any evidence that the employees involved felt threatened by the statements of these two supervisors.

Respondent misperceives the applicable standard. The Board and the courts employ an objective test when considering employer statements that allegedly violate Section 8(a)(1). The test seeks to determine only whether the conduct at issue reasonably tends to interfere with employees’ exercise of their Section 7 rights. *NLRB v. Hitchiner Mfg. Co.*, 634 F.2d 1110, 1113 (8th Cir. 1980). Hence, the employee’s actual perception of interference, coercion, or restraint lacks relevance. Nor is the speaker’s explanation of intent relevant. “The test is not one of intent . . . but whether the threatened conduct has a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights.” *Cox Fire Protection*, 308 NLRB 793 (1992).

Clearly, Hart knew of Blazek’s strong support for union representation. Winters’ statement to Hart that Blazek’s failure to

“drop the issue with the union” and to “back off” provides an unmistakable message that Blazek’s troubles was rooted in his outspoken stand on behalf of the Union. Likewise, I find it reasonable to infer that Hopkins also alluded to Blazek’s union activities with his “just didn’t know when to quit” remark. When coupled with Hopkins’ effective characterization of Carter’s warning for the defective Minnesota tax form job as simply a device designed to lend verisimilitude to Blazek’s discipline, I find Hopkins’ statement to Carter on December 14 to be coercive. As discussed below, Hopkins’ remark about Carter being in the way, when considered with his intimate knowledge about the particular production problems that led to Blazek’s discharge, betrays a legitimate motivation. Since both statements project the message that Blazek’s outspoken support of the Union resulted in retaliation by the Company, I conclude that Respondent violated Section 8(a)(1) as alleged in complaint paragraphs 5(a) and (b).

#### 2. The 8(a)(3) allegations

Section 8(a)(3) provides that it is an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” The elements of a discrimination case under Section 8(a)(3) include: (1) showing that the employee engaged in protected activity; (2) proving that the employer knew about the employee’s protected activity; and (3) establishing the employer’s hostility toward the employee’s activity. *Best Plumbing Supply*, 310 NLRB 143 (1993). *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), approving the Board’s test in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), sets forth the analytical model applicable to all 8(a)(3) cases that turn on the issue of motivation.

Under the *Wright Line* test, the General Counsel has the burden of showing that union activity constituted a motivating factor for an employer’s adverse action against an employee. More precisely, this means that the General Counsel has the burden of persuading the fact finder that the employee’s protected conduct, *in fact*, amounted to a motivating factor for the employer’s action. *Webco Industries*, 334 NLRB 608 *fn.* 3 (2001). In assessing whether the General Counsel has met his burden of persuasion, the fact finder may consider the explanation provided by the employer for the adverse action. *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2d Cir. 1992). The *Wright Line* test applies regardless of whether the case involves pretextual reasons or dual motivation. *USF Dugan, Inc.*, 332 NLRB 409, 413 (2000). However, a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied on, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 225 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

If the General Counsel establishes that the employee’s protected activity motivated the employer’s decision, the burden of persuasion shifts to the employer to establish, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in the protected conduct. *Best*

<sup>12</sup> In addition, Respondent’s argument in its brief suggests that the recollection of Hart and Carter about these statements may be less than reliable. I disagree and credit them both. Neither Winters nor Hopkins disputed the statements attributed to them.

*Plumbing Supply*, supra. Because the employer bears the burden of persuasion, not merely production, *Transportation Management Corp.*, supra, it cannot simply recite a legitimate reason for the discharge but must “persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

On the other hand, an employer violates Section 8(a)(1) of the Act by taking adverse action against an employee based on its good-faith but mistaken belief that the employee committed serious misconduct while engaging in activity protected by Section 7 of the Act. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). These types of cases require no specific showing of a prohibited motive in order to find the employer’s adverse action unlawful. *Tracer Protection Service*, 328 NLRB 734 (1999). Where an employer imposes some form of adverse action against an employee for alleged misconduct arising out of protected activities, the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. If the employer meets that burden, the General Counsel must then show affirmatively that the misconduct did not occur. *Pepsi-Cola Co.*, 330 NLRB 474, 475 (2000); *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952).

In this case, I conclude that the *Burnup & Sims* test applies to the July 13 discipline of Blazek for allegedly leaving his workstation early in order to serve as the Union’s election observer on June 26. I conclude that the *Wright Line* test applies to the remaining disciplinary actions Respondent took against Blazek. I turn now to consider each individually.

**Complaint Paragraph 6(a)—Barring Blazek from Pre-press:** An employer violates Section 8(a)(1) and (3) of the Act by changing an employee’s working conditions to deter and discourage union activities. *Nortech Waste*, 336 NLRB 554 (2001). (Discriminatorily reassigning a union activist to a job that would increase her risk of injury and to isolate her from other employees); *Parts Depot, Inc.*, 332 NLRB 670, 671 (2000). (Discriminatorily restricting an employee’s movements around the plant after learning about her union activity.); *CVN Cos.*, 301 NLRB 789, 792 (1991). (Discriminatorily requiring an employee active in union organizing to provide written verification from a security guard as to when she left the company premises.) Generally speaking, an employer cannot ban discussions that pertain to unions or unionization during worktime while permitting employees to discuss other nonwork matters. *Industrial Wire Products*, 317 NLRB 190 (1995).

Here, Respondent permitted pressmen to engage in idle small talk with the pre-press employees when they went to that area for work purposes. Occasionally, pressmen even went there during worktime solely to discuss personal matters with pre-press employees. Yet, when the union organizing campaign began, Respondent’s managers encouraged floor supervisors to limit and restrict small group gatherings of all kinds in an obvious effort to stifle employee discussions that might relate to unionizing. In this atmosphere, I credit Blazek’s assertion that Scherbing barred him from going to the pre-press room on June 20 expressly because another manager feared that he would be

promoting unionism among the pre-press employees during his visits to that department.<sup>13</sup>

I reject Respondent’s contention that this amounted to a mere misunderstanding that Scherbing promptly corrected after he learned that Blazek had been “childishly” leaving materials in the pre-press entryway. In fact, Scherbing made no effort to rectify the situation until immediately after it became the subject of the first unfair labor practice charge. As this restriction departed from the standard procedure whereby pressmen routinely had access to the pre-press department in connection with their work duties, I find Respondent violated Section 8(a)(1) and (3) by barring Blazek from the pre-press area in an effort to stifle his union activity.

**Complaint Paragraph 6(b)—The July 13 Verbal Warning.** Section 102.69 of the Board’s Rules and Regulations provides that “[a]ny party may be represented [at the election] by observers of its own selection, subject to such limitations as the Regional Director may provide.” It follows that Section 7 protects employees who serve as NLRB election observers and that an employer violates Section 8(a)(1) and (3) of the Act by disciplining or otherwise interfering with employees who do so. See, e.g., *Lemon Drop Inn v. NLRB*, 752 F.2d 323, 326 (8th Cir. 1985); *NLRB v. Builders’ Supply Co. of Houston*, 410 F.2d 606, 609 (5th Cir. 1969).

The General Counsel argues that a violation has been established as to this issue by an analysis of the facts under either *Wright Line* or the *Burnup & Sims*. Respondent, in effect, contends that Blazek abandoned his station at a critical time on June 26 without obtaining the approval by any supervisor or manager.

As noted, I find the *Burnup & Sims* analytical model applies here. As Respondent concededly disciplined Blazek for alleged misconduct in connection with his service as the union observer, the General Counsel prevails if no credible basis exists to find that Blazek, in fact, engaged in the misconduct attributed to him, i.e., failing to obtain supervisory approval to leave early so he could serve as the union’s election observer.

I credit Blazek’s claim that he twice obtained approval to leave his workstation early on June 26. The first occurred on Monday June 24 when he spoke with Acting Shift Supervisor Nolen and second occurred shortly before noon on June 26 when he spoke with Supervisor Twomey. As Nolen failed to testify, nothing contradicts Blazek’s testimony concerning their brief exchange on the morning of June 24. I find no basis exists for discrediting Blazek’s uncontradicted testimony about his brief discussion with Nolen. Scherbing and Weiss’ hearsay assertions that Nolen denied speaking with Blazek about leaving early on June 26 fail to meet the burden of showing that Blazek, in fact, engaged in misconduct.

In addition, I credit Blazek’s claim that he spoke directly to Shift Supervisor Twomey just before noon on June 26 about leaving early that day to serve as an election observer over Twomey’s contrary claim. Even though Respondent termi-

<sup>13</sup> It follows that I do not credit Scherbing’s carefully shaded testimony that eschews any disparate purpose and that implicitly attributed the limited withdrawal of the restriction on July 19 to something other than the filing of the unfair labor practice charge a few days before.

nated Twomey in September and he appeared at the hearing as a General Counsel witness, I nevertheless find it improbable that Blazek failed to inform Twomey about his early departure on June 26 for three principal reasons. First, Twomey acknowledged that Blazek became very cautious in the days leading up to and following the election. Second, everyone acknowledges that Blazek informed Max Hopkins Jr., his shift supervisor the following day, that he needed to leave early again to serve as an observer. Third, pressman Randy Hart recalled that Twomey had told him during the afternoon of June 25 that he had to “look for someone for [Blazek]. He’s got something to go with the union.” This collection of circumstances strongly supports Blazek’s account.

Moreover, I find Respondent’s assertions grounded on Eliason’s presence exaggerated, misleading, and untruthful. Regardless of the time that Eliason actually arrived at the plant, the July 19 tape recording contains an outright admission by Scherbing that, as Blazek repeatedly claimed, Eliason became agitated because of the inability of anyone to locate replacement oil for the folder after he completed his repairs. The claim by Scherbing and Hopkins that every experienced pressman knows that oil is readily available at each press only contributed to the utterly untruthful quagmire Respondent got itself into attempting to justify this egregious disciplinary action. Finally, Scherbing’s failure to even raise the issue with Blazek until a week later contributes to the conclusion, which I have reached, that Respondent fabricated the basis for this disciplinary action.

Accordingly, I find that Respondent failed to establish with credible evidence that Blazek engaged in any misconduct in connection with leaving his workstation 90 minutes early to act as the Union’s election observer on June 26. It follows that the documented verbal warning Respondent issued to Blazek on July 13 violated Section 8(a)(1) and (3), as alleged.

**Complaint Paragraphs 6(c), (d), and (e)—The August 29 “enhanced” warning and the denial of Blazek’s pay increase.** General Counsel does not contest Respondent’s right to discipline Blazek over the confrontation he had with Engelstad on August 8. Instead, the General Counsel asserts that Blazek would have received only a verbal warning over this incident under Respondent’s progressive disciplinary system if Respondent had not previously issued an unlawful verbal warning to him on July 13. The General Counsel further argues that, without this particular written warning, Blazek would have qualified for a pay increase even under Respondent’s new August 20 policy but for the August 8 written warning.

Respondent argues that the August 8 incident between Blazek and Engelstad warranted a written warning and justified the denial of Blazek’s pay increase on two grounds: first, Blazek’s prior verbal warning of July 13 fully justified the issuance of a written warning under the progressive disciplinary policy; and second, the altercation between Blazek and Engelstad constituted serious infraction “that disrupted operations, raised potentially dangerous safety problems that could have caused bodily injuries as well as damage to product and equipment.” Consequently, Respondent claims that the written warning for this incident “would have been fully justified” even in the absence of the prior verbal warning. Since Respondent

believes that this written warning to be fully justified, it was entitled to deny Blazek’s yearly wage increase.

Discipline that arises from prior unlawful discipline violates the Act. *Care Manor of Farmington, Inc.*, 318 NLRB 725 (1995); *Dynamics Corp.*, 296 NLRB 1252, 1254 (1989), *enfd.* 928 F.2d 609 (2d Cir. 1991). I find that the General Counsel has met the *Wright Line* burden as to these allegations by making a *prima facie* showing that the August 29 warning and the denial of Blazek’s 2002 pay increase resulted directly from his unlawful verbal warning in July. In view of my conclusion that the July 13 warning violated the Act, Respondent’s *Wright Line* burden here required it to persuasively show that Blazek merited a written warning without reference to the July 13 warning. *Teledyne Advanced Materials*, 332 NLRB 539 (2000).

Respondent contends that Blazek deserved the August 29 written warning without regard to the unlawful July 13 verbal warning because of the seriousness of his altercation with Engelstad. However, Engelstad received a verbal warning over the incident and Respondent made no attempt to establish greater culpability on Blazek’s part for whatever occurred between the two of them. In fact, the record contains virtually no reference to the incident apart from the vague warning itself and a very oblique reference to it by Blazek. For this reason, I find Respondent’s claim that Blazek merited a written warning under the progressive disciplinary system unpersuasive. Instead, the fact that Engelstad, the other participant in the altercation, received a verbal warning for his part in the incident strongly supports an inference that Blazek too would have received the same discipline absent his prior unlawful discipline. Accordingly, I find Respondent failed to meet its burden of persuasion under *Wright Line* and conclude that it violated Section 8(a)(1) and (3) by issuing Blazek a written warning concerning his August 8 incident with Engelstad. It follows that Respondent also violated Section 8(a)(1) and (3), as alleged, by applying its new “written warning” policy to deny Blazek a 2002 wage increase.

**Complaint Paragraphs 6(f) and (g)—Blazek’s suspension and termination.** The General Counsel argues that Respondent targeted Blazek for termination because of his protected union activity. General Counsel notes that his supervisors all regarded him as an excellent pressman who produced a lot of work and that he had no prior production-related discipline before the events in November and December 2002. In the General Counsel’s view, Scherbing’s remark to Twomey after Respondent issued Blazek a written warning on August 29 warning to the effect that they would have had Blazek by that time if they had a safety director with “balls” betrays Scherbing’s continuing discriminatory intent. In addition, the General Counsel contends that the entire basis for the Respondent’s conclusion that Blazek should be held responsible for the difficulties encountered with the Minnesota tax form and GPO projects is based primarily on Scherbing’s incredible testimony and that it is a pretext used to finally rid itself of Blazek.

Respondent argues that Blazek’s became angry and withdrawn following the Union’s defeat in the June representation election. Eventually, Respondent contends, his sullen deportment led to his inability to properly direct his crew and pay attention to his job. Respondent points to the uncontested dis-

ciplinary actions of August 29 and October 30 as well as Krysiak's description of Blazek's hostile and argumentative actions at a crew meeting in late October or early November as examples of his unacceptable behavior that preceded his work deficiencies in November and December. Respondent contends that Scherbing properly investigated and identified the crews responsible for the defective work performed on November 7 and 29, and December 5. As a result of this investigation, he properly concluded that "not only was Blazek directly responsible for failing to prevent these unacceptable signatures from being discarded, but also that he had improperly allowed them to be put on pallets and shipped to the bindery where they would be incorporated with other materials for shipment to the customer. Following a through consideration of the facts involved in these "instances where his neglect, intentional or otherwise, resulted in defective product being produced" the Company's decision makers unanimously concluded that . . . termination was the only appropriate action."

In my judgment, General Counsel has provided a very persuasive case that Blazek's termination actually resulted from Respondent's strong union animus. All acknowledge Blazek's open and militantly prounion stance during the period leading up to the election. The unlawful conduct directed at Blazek both before and after the NLRB election, the wide-open and cynical badgering of Blazek in the preelection period, and management's immediate interference with the early organizing efforts by the warehouse and bindery employees demonstrates the deeply-held and unrestrained union animus which exists among Respondent's managers and supervisors. Johnson's response to Twomey suggesting that it would not hesitate to use its disciplinary procedures to quell the uprising for representation is consistent with what occurred shortly after the NLRB election. I find Respondent's later effort to pin primary responsibility for the Minnesota tax form job on Blazek totally transparent especially in the face of Carter's specific acknowledgment of responsibility and Hopkins' nearly continuous presence when the defective product was allegedly produced. This strange allocation of responsibility, which I find to be completely at odds with the plant's culture concerning the responsibilities of the first and second pressmen, is entirely consistent with Respondent's prior, unlawfully-motivated disciplinary actions against Blazek and the conclusion that Respondent was simply out to get him. Finally, the remarks by Supervisors Hopkins and Winters following Blazek's suspension provide strong support for concluding that Blazek's militant union activity motivated his suspension and termination.

As the General Counsel met the burden of establishing that Respondent's suspension and termination resulted from Blazek's protected activity, Respondent had the burden of showing that it would have taken the same action even absent that activity. Respondent failed to show persuasively that it would have occurred. First, even assuming that Blazek had primary responsibility for the Minnesota tax form job (which I do not), other evidence shows significant errors occurred on other jobs throughout the year but Respondent failed to produce any precise evidence about the nature of the disciplinary action taken, if any, in those other situations. Such evidence would have gone a long way toward establishing that the disciplinary

action taken against Blazek was consistent with its usual practices.

Second, the General Counsel correctly notes that the explanations for the actions taken against Blazek rests almost entirely in the lap of Scherbing, a witness whose veracity I cannot trust in view of his unsuccessful effort to pin blame on Blazek for a production interruption of serious proportions when he left to serve as the election observer. Scherbing's exaggerated story about the loss of production time on that occasion until pressman Walters arrived totally collapsed after it was shown that Walters did not work at all that night. In addition, I found Scherbing's explanation for waiting until July 19, 4 days after the filing of the first unfair labor practice charge, to correct Blazek's alleged misunderstanding about being barred from the pre-press room entirely disingenuous. Likewise, I find his bland assertion that the other crews had no wrinkling problems on the Minnesota job extremely dubious in view of their crew reports. Krysiak even went out of his way to contradict Scherbing's positive placement of Blazek at the production end of the press on the December 5. In short, I find his veracity highly questionable and I am reluctant to credit his testimony absent substantial corroboration. Critical portions of Scherbing's testimony lack the corroboration obviously available.

Third, even though Respondent went to substantial lengths to attach primary blame on Blazek for failing to attend to his second pressman duties on the Minnesota tax job, it completely let the second pressman off the disciplinary hook for the alleged defects on the November 29 and December 5 GPO work. This type of inconsistency, against the background of the extreme union animus harbored by Respondent's managers and supervisors and Carter's explicit acceptance of responsibility for passing the November 7 work on to the bindery, strikes me as completely incomprehensible and consistent with its targeting of Blazek. Nor do I find this inconsistency explained at all by the disparity in pressman experience. Carter's conduct on November 7 certainly does not reflect that of an inexperienced pressman regardless of his classification. Furthermore, Hopkins was at his side through most of that morning.

Fourth, Respondent's assertion that Hopkins played no role in the disciplinary decision taken against Blazek for the November 7 Minnesota work is either incomprehensible or incredible in view of his considerable presence at the scene for such a lengthy period in his capacity of acting pressroom manager due to Scherbing's absence. Either way, Respondent's failure to demonstrate what type of role its own acting pressroom manager at the scene played in its investigation the Minnesota job simply fails to inspire confidence that its motive are honest. Even a modicum of the discourse that surely occurred between Scherbing and Hopkins during the investigation he allegedly conducted concerning the Minnesota project might have served to explain the legitimacy of Scherbing's ultimate assessment of responsibility. Its absence, when considered together with the fact that Hopkins made a postsuspension comment strongly implying that Respondent, in effect, had been out to get Blazek because he did not know when to quit with his protected activities, lends substantial support to the conclusion Blazek's union militancy caused to his suspension.

Fifth, I simply fail to sympathize with the Respondent's claim that Blazek's attitude deteriorated after the NLRB election. No doubt, he became very circumspect about Respondent's motives following the July 13 verbal warning but, in my judgment, he had good cause to do just that. The hubris so unquestionably evident in its managers' refusal to accept Blazek's explanation for leaving his station ninety minutes early to serve as the election observer, their extreme delay in even questioning this conduct, and the failure to produce Nolen as a witness simply colored my whole perception of Respondent's entire defense in this case. That was particularly so when it turned out that the Blazek's assertions about the source of Eliason's discontent turned out to be admitted by Scherbing on July 19.

In sum, Respondent failed to persuade me by a preponderance of the evidence that it would have taken the same action against Blazek even absent his union activity. Here, Respondent adduced a considerable amount of weak evidence when strong evidence was obviously and readily available. Hence, the inference is warranted that the stronger evidence would not support the proposition Respondent advanced. *Interstate Circuit v. U.S.*, 306 U.S. 208 (1939). Accordingly, I find Respondent failed to meet its *Wright Line* burden and that it violated Section 8(a)(1) and (3) by suspending and discharging Blazek.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by issuing Mike Blazek a documented verbal warning on July 13, and by telling employees that another employee had been terminated for engaging in union activities.
4. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act by discriminatorily denying Blazek access to the pre-press room, by enhancing Blazek's August 29 discipline to the level of a written warning based on the unlawful July 13 warning, by denying Blazek a wage increase based on the unlawfully enhanced written warning of August 29, by suspending Blazek on December 13, and by discharging Blazek on December 19.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy Blazek's discriminatory discharge, Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). To remedy the unlawful denial of a wage increase in September 2002, Respondent will be required

to reimburse Blazek for the difference between what he would have earned from the date such an increase would have become effective and what he actually earned to the date of his discharge. *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971). Interest must be added to the backpay amounts due under both methods of computation as provided in *New Horizons for the Retarded*, 283 NLRB 1173, 1174 fn. 12 (1987). For periods following the date of Blazek's discharge, the increased wage rate he would have received in September (as well as other increases he would have received thereafter) should be used in the backpay remedy ordered.

Respondent must further expunge from any of its records any reference to Blazek's July 13 warning, and his subsequent suspension and discharge, and notify him in writing that such action has been taken and that any evidence related to those disciplinary notices will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Having concluded that Respondent unlawfully enhanced Blazek's August 29 disciplinary action under its progressive disciplinary system, it will be required to designate that actions as a documented verbal warning and notify Blazek in writing that such action has been taken.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

#### ORDER

The Respondent, Banta Catalog Group, A Division of Banta Corporation, Maple Grove, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Threatening employees by telling them that an employee had been discharged because of his union or protected concerted activity.
  - (b) Prohibiting access plant areas where employees typically go in the course of their work in order to prevent employee discussions about topics protected by Section 7 of the National Labor Relations Act (Act).
  - (c) Taking disciplinary action against employees because they act as union observers at a representation election conducted by the National Labor Relations Board.
  - (d) Enhancing disciplinary action under its progressive disciplinary system based on prior unlawful discipline.
  - (e) Denying employee wage increases based on unlawfully enhanced discipline.
  - (f) Discharging, suspending, or otherwise discriminating against any employee for supporting Graphic Communications International Union, Local I-M, or any other union.
  - (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.

<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.



(a) Within 14 days from the date of this Order, offer Mike Blazek full reinstatement to his her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Mike Blazek whole with interest for any loss of earnings and other benefits suffered because of the discrimination against him, in the manner set forth in the Remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the Mike Blazek's July 13 disciplinary action, December 13 suspension, and December 19, 2002 discharge, and within 3 days thereafter notify the Blazek in writing that this has been done and that these three disciplinary actions will not be used against him in any way.

(d) Within 14 days from the date of this Order, modify the disciplinary action taken against Mike Blazek on August 29 to the level of a documented verbal warning, and within 3 days thereafter notify Blazek in writing that this has been done.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under this Order.

(f) Within 14 days after service by the Region, post at its facility in Maple Grove, Minnesota, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: May 28, 2004

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees by telling them that another employee had been discharged because of his union or protected concerted activities.

WE WILL NOT prohibit access to plant areas where employees typically go in the course of their work in order to prevent employee discussions about topics protected by Section 7 of the Act.

WE WILL NOT take disciplinary action against an employee because he/she chooses to act as a union observer at a representation election conducted by the National Labor Relations Board.

WE WILL NOT enhancing discipline under our progressive disciplinary system based on prior unlawful discipline.

WE WILL NOT deny employee wage increases based on unlawfully enhanced discipline.

WE WILL NOT discharge, suspend, or otherwise discriminate against any employee for supporting Graphic Communications International Union, Local 1-M, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees because they chose to exercise rights guaranteed to them by Section 7 of the Act.

WE WILL offer Mike Blazek full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Mike Blazek whole for any loss of earnings and other benefits suffered as a result of the discrimination against him together with interest as provided by law.

WE WILL reduce the written warning issue to Mike Blazek on August 29, 2002, to a documented verbal warning and thereafter notify Blazek in writing that this has been done.

WE WILL remove from our files any reference to the Mike Blazek's July 13 documented verbal warning, his December 13 suspension, and his December 19, 2002 discharge, and thereafter notify Blazek in writing that this has been done and that these three disciplinary actions will not be used against him in the future in any way.

BANTA CATALOG GROUP, A DIVISION OF  
BANTA CORPORATION

<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."